
lava net

Ms. Natalie Roman Sales
Office of the Secretary
Federal Communications Commission
445 12th St. SW Room TW-B204
Washington, DC 20554
Re: GN Docket No. 00-185

11/30/00

Dear Ms. Salas:

Since 1994, LavaNet has built a strong presence as Hawaii's largest locally owned Internet service provider (ISP). We have been successful because of many business factors, but primary to our success are existing regulations requiring the telephone companies to sell data services to competitors at rates no higher than they charge their own holding companies. Without such safeguards, over 25 local Hawaii ISPs and hundreds of National ones which collectively provide a wide variety of choice in Internet services as an industry simply would not exist. This reality ot competitive access is the cornerstone of today's thriving Intenet. A simple "resell" model would only produce "fake competitors" - different brands of the same telco service.

We feel strongly that a comprehensive federal policy requiring nationwide access terms similar to those used for the Telcos - terms that have empowered the current Internet generation - be applied to Cable Internet and other forms of "broadband" data networks. True competitive access is essential to consumer choice and the unfettered growth of today's healthy Internet community. A broadband policy that encourages real competition will engender innovation, and consumer choice based on real, tangible differences in content, services, pricing, policies and features. There are many ways that Open Access will benefit the consumer. The ISP business is not "one size fits all" as the Cable companies like to believe. For instance, independent portals to *content* are one example of how drastically different ISPs are in their approach to consumer privacy.

Compare the privacy policies of "Road Runner" - sole provider of our local Cable offering where user data are gathered and brokered by policy, and users do not have a choice as to whether their privacy is infringed this way - to LavaNet's, where we have essentially the *opposite* policy (we publicly declare that we do not broker user information in any way). If consumers are all forced to use the cable-owned ISP, they have *no choice* in this critical aspect of digital citizenship, and that is wrong. Even as the cable companies assert their willingness to allow competitive access, it is unlikely that they would find a compelling reason to allow a competitive ISP to operate in this way if the terms are left solely to the cable companies, and will prevent the cable company from requiring ISP compliance with their unreasonable policy.

I will include our detailed analysis of the local situation as presented to our DCCA (the local agency responsible for oversight of the cable franchise) for their consideration in renewing the local Time Warner franchise agreement. While Federal law separated Open Access requirements and the local franchise renewals, we now seek your support for this initiative at the national level, especially at the FCC, where it should rightfully be resolved.

Sincerely,

Ms. Yuka Nagashima, President
LavaNet, Inc.

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What is "Open Access"?
(also known as "Competitive Access")

"Open Access" guarantees the right of the consumer to choice in broadband Internet providers.

Specifically, the cable franchisee allows network level access to support competitive offerings of broadband Internet transport services over cable (OSI layer 2).

Open Access further requires that access is granted for a reasonable fee, in no case more than what the cable company charges themselves or their own holding company.

Internet access is unbundled from the provision of cable video content.

Open Access seeks to apply to cable the same principles which have promoted the incredible advances of the last ten years in telecommunications.

Prepared Testimony for Department of Commerce and Consumer Affairs

Cable Franchise Transfer Hearing 5/31/00
Submitted by: LavaNet, Inc.
Clifton Royston & Kit Grant

To: Department of Commerce and Consumer Affairs
Attn: Sanford Inouye, Clyde Sonobe, Kathryn Matayoshi
FAX: 586 2625

From: Kit Grant, LavaNet Inc.
FAX: 529-0596
Phone: 545-5282

Aloha,

Thank you for the opportunity to present our concerns regarding the TIme Warner/AOL merger and the competitive access protections needed in the franchise to ensure Hawaii consumers have a fair, liveable nine year agreement with our cable franchisee.

I wanted to write a followup message to you for inclusion with LavaNet's testimony. Mostly I wanted to make sure that the DCCA understands that what the franchise applicant erroneously called "Open Access" in its testimony is **not** Open Access (aka "Competitive Access").

It's time to clear that up. Open Access guarantees the right of consumers to choice in broadband providers, by ensuring that cable companies resell on the same terms telephone companies (local exchange carriers) do: without discrimination and for fees no more than what they charge themselves or their own holding companies.

What the franchise applicant proposes is that they will resell access **to whom they choose, when they choose, at the price they choose. This is not Open Access, nor is it effective competition.** In fact, it is the opposite. What is proposed is a continuation of the current situation: a closed system with monopoly power. whichwill include its cronies at its discretion.

Unprotected multiple ISP access is **not** Open Access, and should not be touted as such. In fact, before AOL owned the wire, they themselves subscribed to the correct description of Open Access. That they now choose to redefine it to their benefit is a stunning reversal. That they further refuse to allow their own promise for competitive access to be made a binding term of the franchise clearly shows they are not in good faith. Without a franchise-level guarantee, nothing prevents them from unilaterally changing this policy and banning or disconnecting all competitors.

The franchise applicant clearly hopes that the DCCA will get confused and might think: "Why change the franchise agreement if the franchisee has already promised the same thing the proposed changes would require? We can just approve the existing franchise transfer request and the franchisee will take care of these objections on their own." This would be a tragic misassessment of the issue and would hand a "natural monopoly" total control of the future of Hawaii's broadband access and content.

It is exactly this type of arrangement that led in the seventies to widespread abuse of monopoly power by the Bell telephone company and the ensuing regulation of competitive access for telecommunications providers. It is the same abuse of monopoly power in one arena to establish monopoly control of another arena that has led to the recent antitrust action against Microsoft.

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Why re-invent the wheel at the expense of Hawaii's consumers and our local Internet industry?

Please let me also add two other things that Open Access is **not**:

Open Access is not "Anti-business."
All businesses operate under some regulation, whether as simple as having a business license, or as complex as operating a public utility or franchise. The job of our regulators and overseers is to protect consumers from companies running roughshod over their rights, while maintaining the environment for free market competition - a cornerstone of American business

Detractors wail that because "Open Access" seeks to safeguard reasonable terms for competition, it places an undue burden on the cable franchisee, and will prevent them from being a vital part of the economy. Any study of the breakup of "Ma Bell" and the resultant competitive access requirements for telephone and data infrastructures shows that when done correctly, this is completely untrue. In a competitive market, the owner of the wire profits more, reaches more people and consumers are better served by it.

What **is** "anti-business" about this whole issue is that a huge monopoly could grab so much of the market so quickly within the existing regulatory framework, with serious repercussions for the thriving local Internet Service industries here and around the world. I have included an article I received today in Boardwatch Magazine regarding the international amoeba-like growth of cable interests.

What is good for business is good for the economy, and good for the consumer. But, what's good for monopolies ("natural" or legally-imposed) is never good for either.

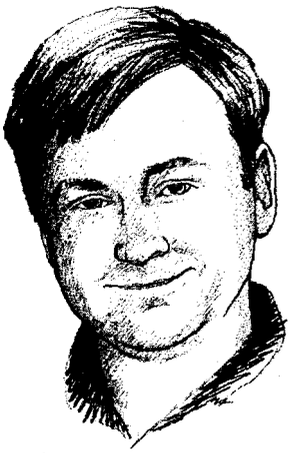
Open Access is not "Regulating the Internet."
Open Access is minimal, correct regulation of the **wire**, not the Internet. The fairest proposal is to handle this in a near-identical fashion to what is required right now of the telephone companies for their two way data transport systems. Open Access will ensure that competitors (for user connections or content) can operate freely and without hindrance while providing reasonable compensation to the owner. Allowing the franchisee (which is not a mere cable company but a subsidiary of an enourmous media, broadcast, and telecommunications company) to have sole discretion over competition would show far too **little** oversite by our consumer advocates, who in their best intentions not to "regulate the net" may accidentally give away consumer protections.

To summarize, I wanted to underscore that the franchisee is only promising to sell to whom they choose, when they choose, at the time and in the manner they choose, andthis is **not** Open Access. Trusting the cable industry to engage in effective self-regulation would be insufficient to safeguard consumer choice, consumer rights and the correct growth of our Broadband Cable infrastructure.

Thanks for reading and for your consideration. Please contact me directly if any further information is needed.

Mahalo.

by Greg Tally



the isp club

DATA CARTELS ON THE RISE

Main Opponents of Open Source, Open Access Join Forces

Now that the Department of Justice recommended that Microsoft be dismantled, a certain sense of the inevitable is creeping into the tech community. Investor panic over the DoJ decision has taken the shine off tech investment as a whole, sending world markets on a terrifying April wobble. Companies that have long accepted their fate as either second fiddles or indentured servants to Microsoft are suddenly dusting off their business development plans, wondering where they can grab new market share.

There is, however, a keen sense of denial emanating from Redmond, Washington. This is because Bill Gates, Steve Ballmer and other top Microsoft representatives realize that the DoJ case is not immune from appeal.

"No matter what the newspaper headlines say, there's absolutely nothing in the current case that justifies breaking us up," Ballmer wrote in an e-mail obtained by Reuters.

"The best is yet to come," an upbeat Gates said in his keynote address at the Windows Hardware Engineering Conference.

Gates and Ballmer are counting on nothing being resolved until a change of government next year — perhaps a more sympathetic Republican president who will reduce the punitive part of the process. But this may be only wishful thinking, especially if the Clinton administration moves with unusual speed and alacrity. A leaked report recommends that Microsoft be strictly controlled during the appeals process. This may possibly include a temporary injunction forcing Microsoft to reveal its source code, regardless of the case's outcome.

This trend does not bode well for consumers. We may end up with high-tech cartels like OPEC, except that these monopolies control customers, content, data and access rather than oil.

Even with divestiture on the way and the software giant to be broken up into so-called *Baby Bills*, the new companies will still possess a near-stranglehold over various market niches — including 90 percent of the operating systems market and nearly equal amount in the office software market.

Microsoft's defense during the trial phase was messy, inconsistent and maddeningly all over the map. But one message did stick — that the speed of justice can't possibly keep up with the speed of the marketplace.

Internet time is too truncated, too swift for the government to right the original wrongs. The browser wars of 1998 that sparked the whole DoJ trial now seem hopelessly out-of-date because this no longer comprises a hotly contested market segment — or an investor and press darling.

MICROSOFT'S NEWEST CARTEL

Microsoft is already involved in other schemes, including a much less-publicized government investigation. The software giant is getting into the cable business.

Yes, cable, the other policy bogey man of recent years.

The European Union is launching an antitrust investigation into Microsoft's proposed acquisition of Telewest Communications PLC, Britain's number-two cable firm. The purchase would give joint control of Telewest to Microsoft and the Liberty Media Group.

In case you haven't been following the Open Access debate, Microsoft agreed last year to buy MediaOne Group Inc.'s 29.7 percent stake in Telewest. Liberty Media is an indirect subsidiary of AT&T. After much expensive litigation and public outcry, AT&T backed away from its policy opposing Open Access — that is, once its existing contracts expire. It's unclear whether, like a death row inmate, AT&T has sincerely found religion or if it is merely buying itself time.

Before AT&T's announcement, consumers using AT&T cable modems had to abandon their existing Internet services — including changing their e-mail accounts and personal home pages — to sign up with a single provider dictated by AT&T. This shut out many ISPs in their home markets, a tactic many found monopolistic.

In the Telewest deal, the main opponents to the Open Source and Open Access movements have joined forces. Both companies see a dovetailing of interests. Both have a history of controlling a commodity to the detriment of competitors. Both set prices to manipulate who can compete. European officials are concerned the deal could strengthen Telewest's already dominant position as a cable supplier within its franchise area.

This trend does not bode well for consumers. We may end up with high-tech cartels like OPEC, except that

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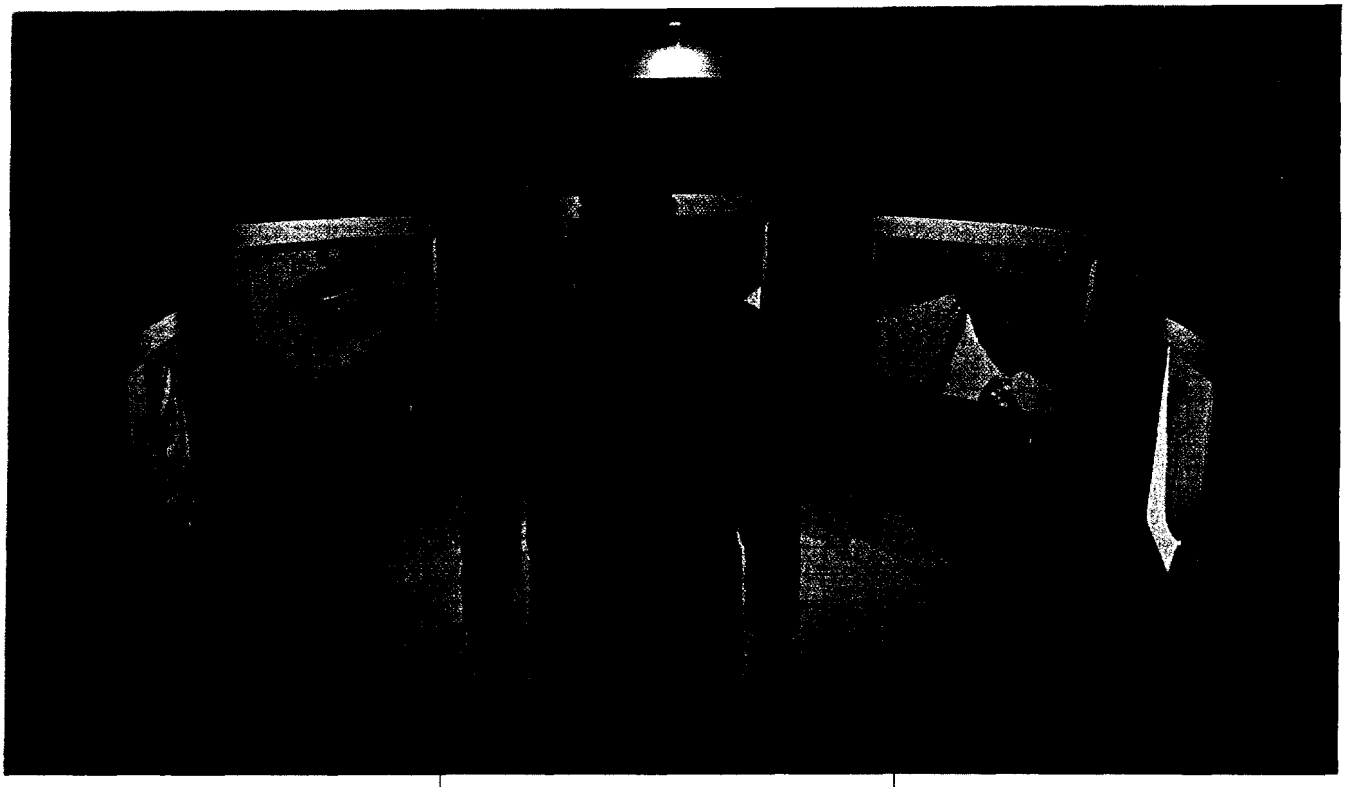
Tally can be reached for comments or general excoriation at `gtally@boardwatch.com`.



these monopolies control customers, content, data and access rather than oil. It's an image somewhat hard to picture, since a monopoly over soybeans, petroleum or cocaine involves a concrete product, not merely abstract ones and zeros.

But the results are the same. Controlling downstream channels to gain a stranglehold over certain market niches has long been the modus operandi in Silicon Valley. Just look at the dominant players in the chip, PC, router and software industries, to name just a few. What is new is that dominant technology companies are partnering with dominant access and content providers, creating economies of scale previously unseen — as well as new levels of possible market abuse.

In the case of Telewest, AT&T could provide its only cable Internet access and content, shutting out competitors with added cost to consumers or other barriers to entry. Since there's a set-top box involved, Microsoft can distribute its operating system onto the customer premise equipment to the exclusion of all other platforms. The EU is expected to rule in the case by August. But the EU's handling of cartels isn't exactly stellar.

Due to overall sloppiness in court proceedings, an EU appeals court slashed by almost 140 million euros the total fines imposed on 41 cement companies accused of price-fixing. Some of the defendants walked free because the commission never announced its intention to impose a fine.

The AT&T/Microsoft partnership isn't the only possibility for cartel-like activity. There has been another scenario of great concern to the FCC — that once the AT&T/MediaOne and the AOL/Time Warner mergers were complete, the two companies would simply use marketing relationships to share content and networks to create a monopoly over the entire cable system.

AOL and AT&T have confirmed that they were in discussions on a broad range of marketing partnerships. Accordingly, the two access giants are realigning their relationships with the rest of the cable industry.

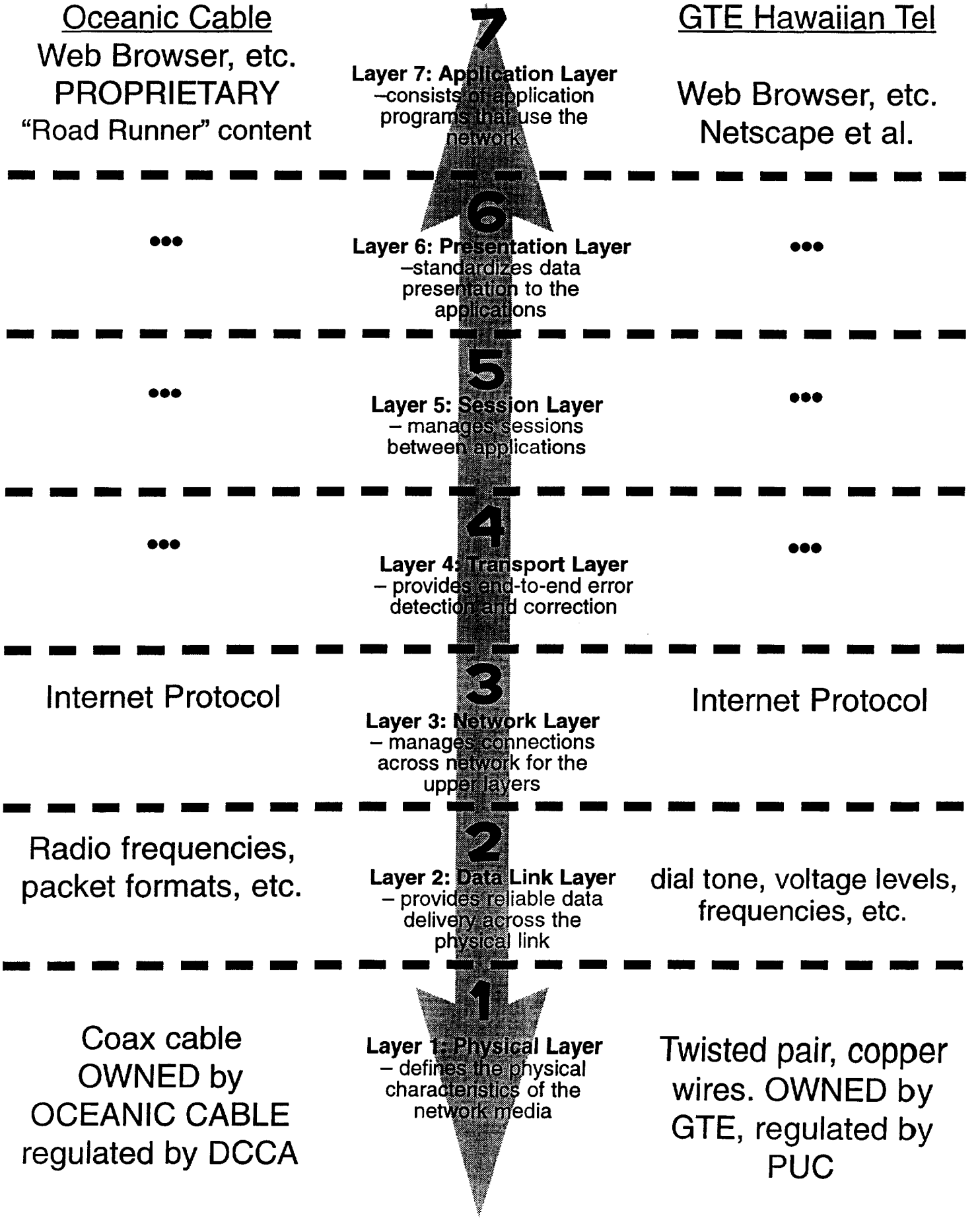
To make things a little more incestuous, MediaOne owns a 25 percent stake in Time Warner's cable systems. The FCC is recommending that MediaOne sell these assets before final approval of the AT&T merger. This would suit Time Warner just fine, because the firm is looking to divest its RoadRunner Internet service. AT&T decided it may try to use the regulatory approval as a pretext to sever its ties with Excite@Home. And as the final piece, AT&T confirmed that it is discussing with Time Warner how the two companies could partner their cable systems.

While AOL outwardly maintains its commitment to competition in both its cable network and content, the revelations of a potential AT&T partnership are making the rest of the access industry very nervous.

To counteract the bully tactics of mega-corps and partnering monopolies, the Federal Trade Commission recommended as much international governmental cooperation as possible. In other words, an international pact where a country agrees to consider another country's request that it initiate or expand an anti-competitive investigation. This, too, could have its drawbacks in terms of infringing on another country's sovereignty or impeding the free market.

Unfortunately, the free market is one of those quasi-religious business terms that everyone invokes until self-interest kicks in. With larger and larger players forming, a few massive partnerships could lock out competition in huge swaths of the tech industry. Our government institutions may not be nimble enough or have enough political willpower to deal with the worst offenders. So in more ways than one, the White House's Microsoft remedy will be a bellwether for the tech industry in the decades to come. ◆

 June 2000 Issue 2/2



Adapted from: TCP/IP Network Administration OSI Reference Model (fig. 1.1)

SECTION ONE:

Why regulation is needed

The history of the cable industry in the United States has shown repeatedly that cable companies can not be trusted to regulate themselves for the benefit of the consumer. The history has involved repeated abuse of monopoly power by many cable companies, regulation of the industry, deregulation (resulting in higher prices, fewer features and consumer outcry), and resulting re-regulation.

This should not be surprising - no monopolistic industry has ever done well at regulating itself. When its own interests first come into conflict with the public interest, or the interests of individual consumers, the companies own interests naturally win out, as the company is legally obligated to put its stockholders' interests above its customers' interests or the public interest.

Given this history, trusting the cable industry to regulate itself would be a classic case of "letting the fox guard the chicken coop."

The cable industry has a long history of asking consumers and agencies that oversee them to trust them. It is unpleasant and socially painful to have to express a lack of trust in the company, but it is the duty of regulators to distrust the companies they regulate, however trustworthy individuals at those companies might be. The fact that cable has been deregulated and RE-regulated twice and is the subject of massive public outcry at this time is a clear indicator that naive trust in any commercial entity is not in the best interests of the consumer, now or ever.

Now in addition, the capabilities of cable lines have increased exponentially to include services the original laws - and the current definition of cable television - do not include, and were never meant to define or regulate. Specifically, the cable infrastructure now permits the delivery of two way, non-video Internet data (and potentially of other data services in the future.) These are not adequately covered by the regulatory structure for cable video access, and fall in the category that would normally be considered FCC or PUC-regulated telecommunications services.

Time-Warner and AOL specifically should not be allowed to dictate terms to the DCCA and the Hawaii public.

The acquired party has a checkered past:

• The current ABC (Disney) and Time-Warner dispute shows that Time-Warner will violate Federal law for negotiation advantages. Time-Warner acted against its customers' interests, against its duty to maintain access to local channels, and in violation of Federal rules by cutting off ABC channels in the New York area during "sweeps week." The management staff who made these decisions are still in decision-making positions in Time-Warner.

• Time-Warner has adopted a policy to refuse to run advertising by regional Internet Service Providers, violating the general principle of freedom of expression.

• Time-Warner raised Oceanic Cable rates despite the DCCA's disapproving the rate increase, and took it to the FCC to override the local decision. This indicates a clear disregard for the consumers' interests as safeguarded by the DCCA, even though the raison d'etre for the DCCA is the protection of local consumers.

• The agreement between Time-Warner and the FCC, under which Time-Warner Cable was obligated to build fiber infrastructure in Hawaii, was the settlement of a dispute between the FCC and Time-Warner about excessive and unwarranted rate increases in the Time-Warner Cable franchises. The FCC settled this by requiring Time-Warner to reinvest the proceeds of the unjustified rate increases in upgrading their infrastructure. (In other words, the "$75 million investment" which Oceanic is proud of citing was never a genuine investment by Time-Warner, but was legally mandated and represents a refund of improper rate increases.)

This should be enough history to clearly show that Time-Warner cannot be trusted to regulate its cable operations in the public interest, no matter how well-intentioned the local management of Oceanic Cable may be. Time-Warner Cable, and now AOL-Time-Warner, has had and will have absolute control over local operations.

The buyer also has a dubious history:

• Although the dialup Internet industry has not been regulated, America Online has been subject to multiple class action suits and other legal actions for false advertising and accounting irregularities.

• Most recently, AOL has been accused of conspiracy in restraint of trade over the latest release of AOL software (version 5.0) which was written to effectively disable the users' PC from accessing competing Internet Providers, by removing normal networking components from Windows without the users' knowledge or permission. This should cast doubt on AOL's commitment to fair competition.

Fairness and Accuracy in Reporting stated:
"AOL was a major player in the fight for "open access" to high-speed cable lines, seeking guarantees that cable lines would be open to competitors in the same way that phone lines are. But now that AOL will own Time Warner's cable lines, will its commitment to open access change? Mainstream media reported AOL CEO Steve Case as saying that it would not. A New York Times editorial (1/11/00) said of Case: "Now he will own the cable wires himself, and he promised yesterday to commit the new company to open access." ABC's Nightline reported (1/11/00):"And today, clearly mindful of their critics, AOL and Time Warner executives insisted their new company would stay open to other providers of Internet content."

'But most media failed to note that AOL and Time Warner were attempting to redefine the concept of "open access." On the same Nightline broadcast, Time Warner CEO Gerald Levin declared: "We're going to take the open access issue out of Washington, and out of city hall and put it into the marketplace, into the commercial arrangements that should occur to provide the kind of access for as much content as possible."

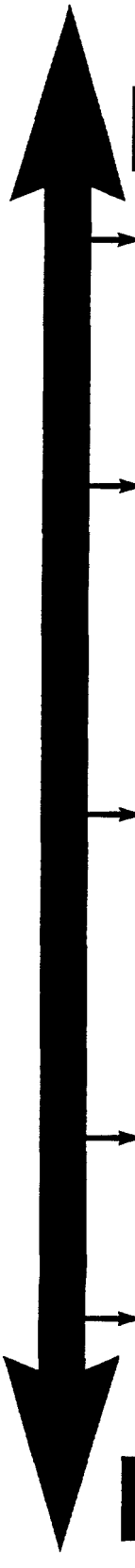
'Clearly, Levin is not talking about regulatory guarantees of access to cable lines, but the potential for competitors to buy access on AOL/Time Warner's terms. This is the opposite of "open access." The Washington Post (1/11/00) accurately portrayed AOL's new position on the access question as "a stunning reversal."'

See: <http://www.fair.org/reports/aol-time-warner.html>

SECTION TWO:

What is the spectrum of actions the Hawaii DCCA could take at this time?

Options range from dramatic (reclassify cable Internet legally) to moderate (require access on the terms AOL specified) to cautious (defer action while appropriate language is developed).



Most pro-consumer, pro-competition

→ **FCC reclassifies non-video cable service as a telecommunications service subject to PUC/FCC jurisdiction.**

- AT&T's lawsuit against Portland will help define whether cable Internet is just a channel or if it is a bona fide telecom service. Portland required the company to open its cable lines to competitors. The case is still in the 9th U.S. Circuit Court of Appeals.

→ **DCCA and State agree to reclassify cable Internet in accordance with Hawaii Telecommunications Act, cable Internet becomes subject to PUC oversight.**

- As the DCCA staff and Time-Warner Cable staff are aware, the Hawaii Telecommunications Act could have allowed non-video cable services to be reclassified as telecommunications service since 1997. The DCCA could require this reclassification as a condition of the merger approval.

→ **Retain DCCA oversight of cable, but require competitive access as a condition of the franchise transfer.**

- States and cities currently requiring or in the process of requiring Open Access: Washington, Oregon, San Francisco, Los Angeles, Iowa, Missouri, Michigan, Pennsylvania, Ohio, Maryland, South Carolina, Louisiana and Florida. *source: www.opennetcoalition.org*
- We propose the AOL Memorandum of Understanding as the source of the lan guage to be used in specifying and requiring Open Access.

→ **Strategic delay of transfer until appropriate language is drafted to guarantee competitive access to cable Internet.**

→ **Approve franchise transfer without conditions for competitive access.**

- We feel this would be the most radical and drastic action the DCCA could take in the present framework, and strongly urge against it.

Most radical / anti-competitive

SECTION THREE: Customers need and want choice in Internet providers. Why consumer choice is necessary in cable Internet

One of the possible objections of local regulatory officials to competitive access or regulation other than on price would be if Internet access were truly "generic" like water or electricity. Some casual onlookers may feel consumers don't really care who provides their cable Internet service and therefore, it's probably OK that there should be just one provider.

This could not be further from the truth. Consumers benefit greatly from a choice of ISPs. In fact, the industry reports that most Internet Service Providers lose over 25% of their customers **yearly** - most of whom are seeking other providers in order to get better service, better speeds, better pricing or specialized services. Many Internet users will tell you that they had to try several Internet Providers before they found one that matched their needs. It goes well beyond just the mechanical aspects of getting people online. It is the relationship the consumer has with their provider and their confidence in that provider to meet their needs that causes them to stay.

Clearly this is not a "one size fits all business", although it could seem that way to the casual observer. Here is a list of factors in the dialup Internet market that vary wildly from provider to provider, and have given rise to our thriving local economy supporting over **20 LOCAL Internet providers** and dozens more national ones:

Different ISPs offer a **wide variety of services** in:

- **PRICING!**

  This is one of the most rich areas of diversity, mostly affected by the following aspects:

- **types of services**
  some specialize, some support every technology

- **offerings for local server colocation**
  some do, some don't

- **Usenet News Feeds**
  with well over 35,000 groups world wide, some ISPs specialize in this arena, others do not offer it or offer truncated feeds.

- **reliability of internal networks**
  some make investments to be ultra-reliable, some run on a shoestring to provide lower cost services.

- **reliability of core internet services like email**
  Email is avery basic Internet service that all ISPs support, but some better than others.This is an example of an area where Road Runner has had a poor track record.

- **degrees of "handholding" for newcomers** to computers
  Some ISPs specialize in customer care, others do not even have a phone number!

- **divergent network backbones** for varying speed and reliability
  There are four major backbone providers in Hawaii, ISPs pick one or even more than one to run traffic to and from the mainland. Some ISPs choose

small affordable feeds, others invest in huge, redundant connections.) This variety is critical since it contributes to the robustness of Internet access in our state. If all consumers use one company and their choice of backbone, then when something goes wrong, everyone could be offline even though a competitive provider might offer alternate routes or better reliability!

- **specialized language services**
  there are Japanese, Korean and Chinese language local ISPs already.

- **Hosting local web pages**
  local ISPs offer a wide range of e-commerce and web hosting options

- **Access to Multimedia**
  in many cable Internet markets, customers are prohibited from accessing streaming video and audio content. Local ISPs set their own policies on what customers can access, but focus on meeting their customer's needs.

- **Different styles of service.**
  Many Hawaii customers prefer a local touch and friendly service. ISPs offer a range of these services to meet unique needs. The Neighbor Islands, frequently "skipped over" as technology advances are keenly interested in good service, accessibility, and performance.

Clearly, ISPs do a lot more than provide a dumb terminal or "hook up". We help people understand and embrace their computers, we help them upgrade their equipment when needed, offering advice and assistance...and the consumers determine which ISPs will thrive based on which ones meet their needs. Don't like your dialup ISP? You can get a new one as easily as changing your shoes.

Multiple sources, multiple voices. In a medium with competitive providers, freedom of content is not an issue. In a medium with one all-powerful provider with media ties, what can consumers expect? Let's review a few facts: AOL already screens content available through its search engine without informing the consumer. It prohibits certain types of language on its system, even though such language enjoys First Amendment protection. Don't like it? Then no cable Internet for you. Technology now allows information to be hidden from consumers without their knowldege.

Time Warner has shown that they view getting content to the consumer as their own discretion (ABC/Disney dispute). How can they be trusted to be complete, unbiased and fair? Don't like it? Read a magazine...oh, wait. They own most of those too.

Having multiple cable ISPs will be healthy for diversity and First Amendment rights. in an open market, customers and ISPs push each other to have the MOST content, the widest range of resources. ISPs that block or filter content find a niche market, and stay focused on a small userbase who likes their business values. The Internet is not one set block of data, but an amalgam of many types of data, to which different ISPs provide different levels of access. This is not widely understood and is one key aspect of why competition is such a critical issue.

Diversity and free expression is too important to put in the hands of a single commercial enterprise, especially one that has shown it will play unfairly to silence detractors and suppress competitors.

That's also why Lavanet has invited other ISPs to join the OpenNet Coalition and to testify here today. LavaNet stands to benefit from offering cable Internet, but this is **not** just a LavaNet issue. We know that if competitive access is granted, we will be one of a number of ISPs sharing the infrastructure. In this case the **only** way we will profit is if we offer superior access. We welcome the opportunity to compete to provide the best cable Internet service we can and to let normal market forces determine the best ISP. Competition is the American Way - not the cable company deciding it, or its hand chosen cronies are to be the only ones.

SECTION FOUR:
Competitive Access is technically feasible. If the political hurdles are cleared, it's "just another highspeed Internet method".

Attached, please find a copy of our original proposal to interconnect with Oceanic's fiber head-end in Mililani. A the time we presented this in 1997, local cable management deemed it "reasonable" and technically feasible.

Shared competitive access to cable Internet is already happening. Cable Internet networks are being shared currently in Ontario. In Florida, tests were successfully completed by GTE who co-operated multiple ISPs on a cable network. This shows conclusively that although there are minor technical hurdles to competitive access, it is very feasible.

A good analogy is the exponential deployment of DSL around the country. CLECs are able to collo-cate DSL equipment at switches without problems. In fact, in the DSL market, we have found that there is ample room for many levels of competition:

1. The telco sell its own DSL data service to ISPs
2. Some ISPs collocate their own DSL equipment at the switch and provide their own own DSL data service
3. Wholesale DSL providers (such as Covad or Northpoint) collocate their own DSL equipment and sell bulk access to other ISPs.
4. Small ISPs who could not afford the hardware costs and legal rigors of becoming a CLEC can simply resell connections from any one of these sources.

None of this interferes with the ability of the phone company 's ISP to sell its own Internet service over DSL. The knowledge gathered by ISPs in the deployment of DSL will be invaluable once cable networks are opened. In the cable Internet market, we see the following possible points for technical interconnection:

1. ISPs can interconnect at the main head-end to the cable providers own digital net work, sharing the use of their installed cable-data equipment at a fairly determined price. (This is the model used by Road Runner).
2. ISPs can collocate at neighborhood head-ends, using their own cable data equip ment using some channel reserved for data service and set aside by the DCCA for competitive access.
3. Wholesale data providers can likewise locate cable data equipment using a reserved data channel, and resell cable access to smaller ISPs.

Once competitive cable access is available, we expect the quality and reliability of cable Internet access to improve dramatically.

The DCCA Has ample authority to place conditions on the franchise merger.

The FCC states: In adopting the 1992 Cable Act, Congress stated that it wanted to promote the availability of diverse views and information, to rely on the marketplace to the maximum extent possible to achieve that availability, to ensure cable operators continue to expand their capacity and program offerings, to ensure cable operators do not have undue market power, and to ensure consumer interests are protected in the receipt of cable service. The Commission has adopted regulations to implement these goals.

In adopting the Telecommunications Act of 1996, Congress noted that it wanted to provide a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition. The Commission has adopted regulations to implement the requirements of the 1996 Act and the intent of Congress.

The 1992 Cable Act codified, and the Commission has adopted, a regulatory plan allowing local and/or state authorities to select a cable franchisee and to regulate in any areas that the Commission did not preempt. Local franchising authorities have adopted laws and/or regulations in areas such as subscriber service requirements, public access requirements and franchise renewal standards. Under the 1992 Cable Act, local franchising authorities have specific responsibility for regulating the rates for basic cable service and equipment.
http://www2.multihousing.com/legal/franchise/fact1.html

The FCC has not pre-empted any local franchise authority to date on the "open access" issue. This leaves regulation of the open access issue and of cable Internet service to the local franchising authority, namely the Hawaii State DCCA, by the FCC's own principles stated here. Moreover, requiring competitive access for cable Internet service is in keeping with the stated spirit of both pieces of legislation:

* the 1992 Cable Act's goal: "to promote the availability of diverse views and information, to rely on the marketplace to the maximum extent possible to achieve that availability..." and

* the 1996 Telecommunications Act's goal: "to provide a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition"

Not only is the FCC affirming the empowerment of the states to make these decisions, the courts have also upheld the rights of the local franchise authorities to make these decisions:

AT&T sued the city and county (of Portland), claiming the local governments did not have the power to impose such a condition - but in June 1999, US District Court Judge Owen Panner ruled in favor of Portland, reaffirming that the local authorities do have the right to enforce competition in broadband Internet access. While AT&T has appealed Judge Panner's decision, leading legal experts expect the decision to be upheld. Oral arguments in the appeals case began November 1.

The openNET Coalition, the Oregon Internet Service Providers Association, the U.S. Conference of Mayors, the National League of Counties, the National League of Cities and the National Association of Telecommunications Officers and Administrators, as well as the cities of Atlanta, GA, Boston, MA, Los Angeles, CA, San Francisco, CA, Baltimore, MD, San Diego, CA, San Jose CA, and Dearborn, MI, and Jefferson, King and Montgomery Counties have all signed legal briefs in the Portland case that supports the rights of cities and counties to make the decision about open access in their communities.

The DCCA has the right to make the decision at a local level, to send a strong message to the FCC and to the franchisees that Hawaii will let the sun shine and will protect consumer rights.

We feel that in this case the DCCA also has the responsibility to change the franchise to include language that will require competitive access over our cable lines. The DCCA has worked hard to understand these issues, so as to make responsible decisions.

LavaNet has been periodically meeting with the DCCA for three years attempting to affect competitive access for Hawaii cable lines, but we have respectfully abided by the DCCA's opinion that it would be inappropriate to change the details of regulation except in conjunction with the cable franchise approval process.

Now, with this franchise hearing before us, which is the LAST opportunity for Honolulu citizens to change the franchise agreement until 2009, we request and implore you to review the facts and make a careful decision, weighing the following options:

- The cable Internet services provided by a service such as Time-Warner's Roadrunner fall within the normal definition of "telecommunications services", which have been shown to be successfully regulated by the processes used in regulating telephone companies, requiring open access. Ultimately we believe this would be the best course for the FCC to take.

- The cable Internet services provided by Roadrunner fall within the specific legal definitions provided in the Hawaii Telecommunications Act for "telecommunications services", as the DCCA is aware. By its nature, it is specifically excluded from the category of "cable video services" which are to be regulated exclusively by the DCCA. It would be within the realm of the DCCA's authority, and fit the letter of the law, for the DCCA to transfer regulation of Roadrunner and any other cable data services offered by AOL-Time-Warner in Hawaii to the Public Utilities Commission to be regulated in a pro-competitive way as telecommunications services.

- As a more conservative or compromise alternative, we would be happy for the Hawaii State

DCCA to retain their oversight of Oceanic Cable and other local subsidiaries of Time-Warner-Cable as a whole, including their data services, but to adopt AOL's own "Memorandum of Understanding" with Time-Warner as a set of legally binding conditions on Time-Warner Cable, to ensure competitive access to cable Internet on the terms which AOL itself had specified. We do not see how AOL or Time-Warner could reasonably object to terms that they themselves wrote.

• Finally, if the DCCA does not feel these alternatives are correct, we would request that you delay approval of the merger, until appropriate language can be drafted to specify immediate competitive access to the cable Internet service in our island state, in a way which does not unduly burden the DCCA's regulatory powers.

The World Wide Web was invented in 1992, less than 9 years ago. If it was in grade school, it would be in second or third grade. Nine years ago, few residents of Hawaii had even heard of the Internet. Now, it is an essential part of most people's lives and livelihoods. That growth and those changes are largely the result of the sudden growth which occurred when the government privatised the Internet and required it be opened up to commercial competition.

If this opportunity to establish competitive access to the cable infrastructure is neglected, the next franchise approval period will be in 2009. Nine years is a very long time on the Internet; 2009 is far too long for Hawaii to be without competition over cable Internet.

I'm sure we are all excited to see what the next nine years bring, and I think we all believe it will bring great progress in media access.

If we want to make the most of it, however, we need to see that competition in service continues, regardless of what technical medium dominates. If the DCCA wishes to serve the public, we must not hand the control of access, content and quality over to a single, over-concentrated media dinosaur, with a history of high-handed and abusive actions towards its customers.

Citizens deserve more, want more, and with your insight and decision, can get more.

Figure A: LavaNet - Oceanic Cable-Modem Access Handling

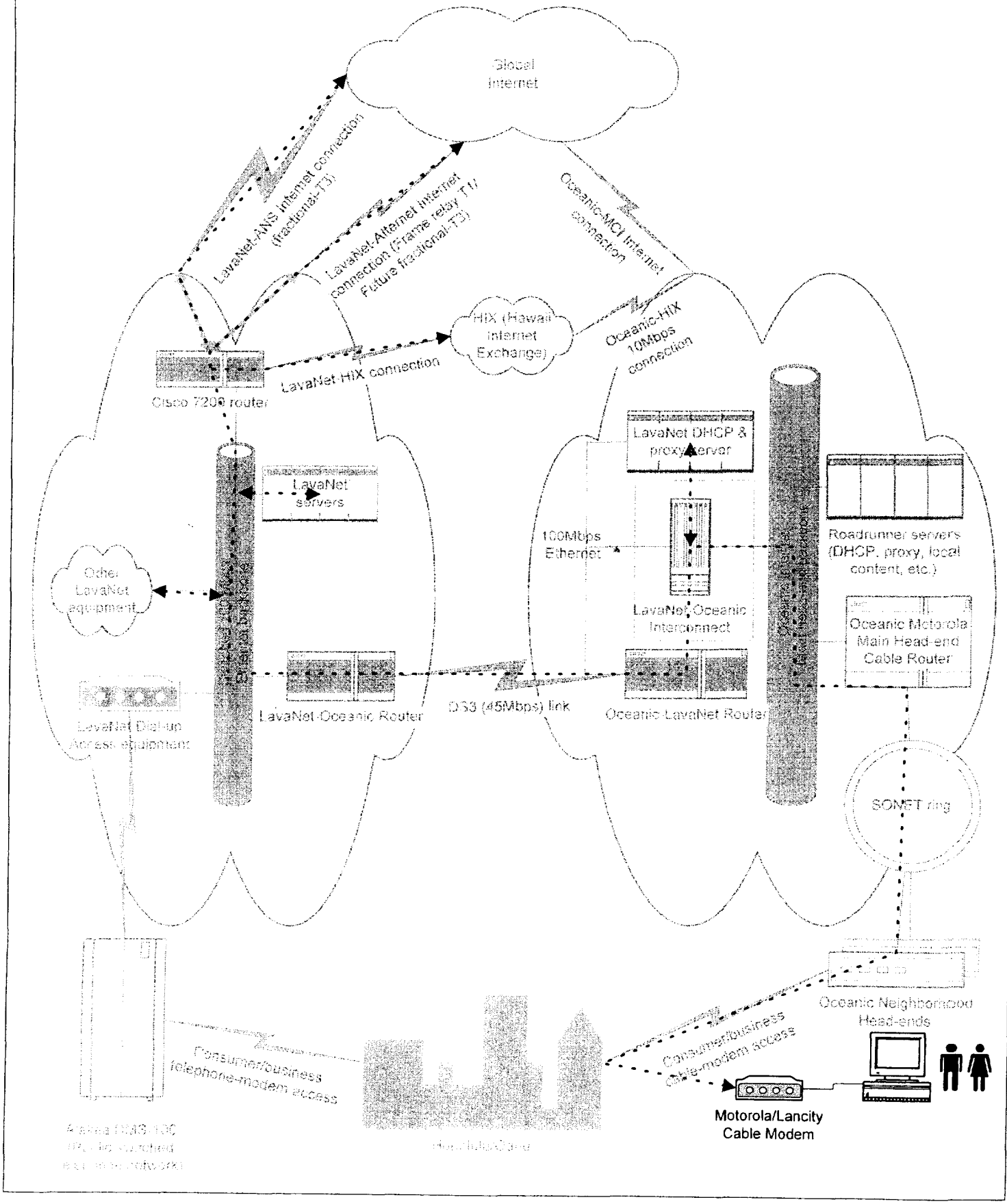


Figure B: LavaNet - Oceanic Internetworking Overview

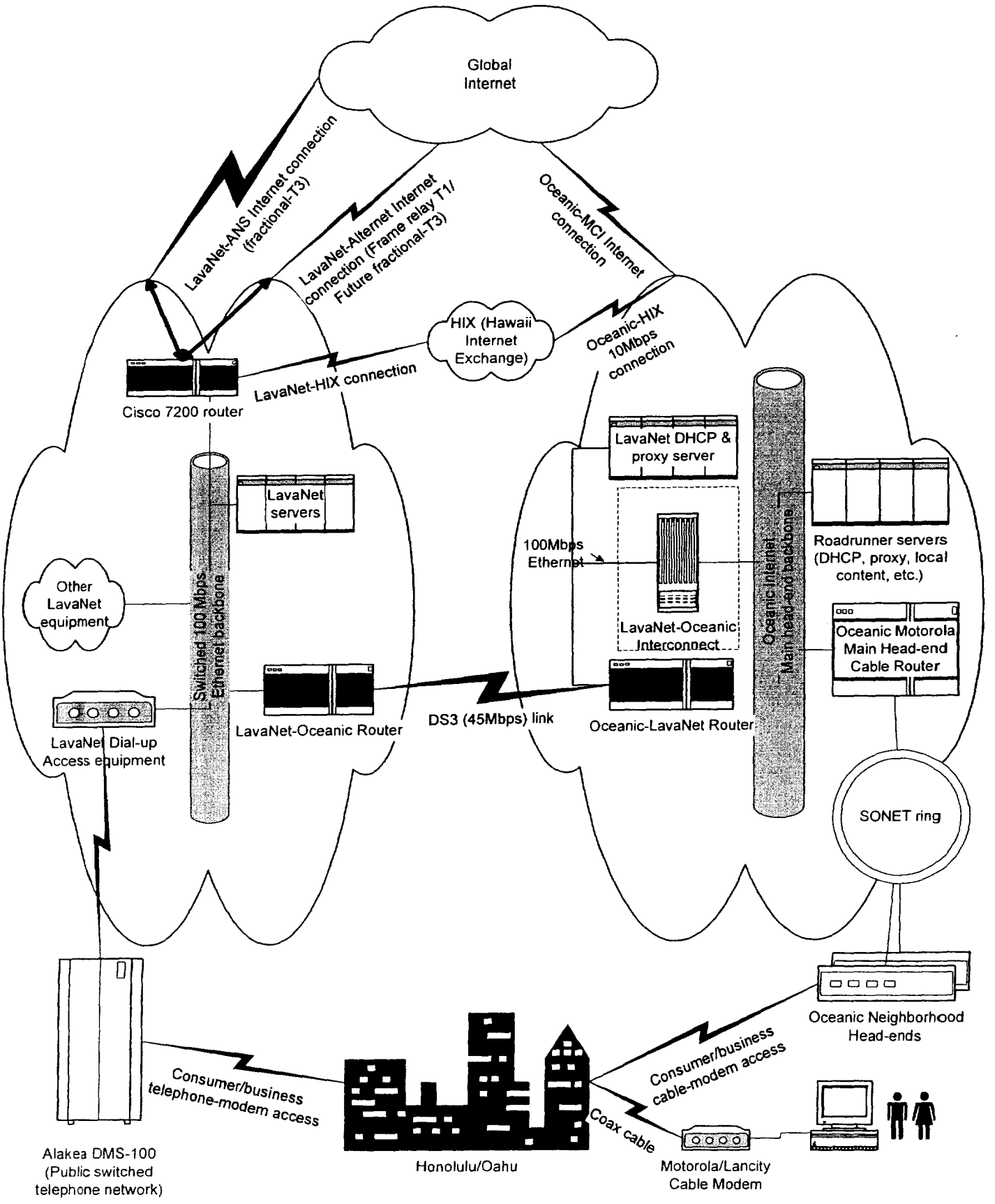


Figure C: LavaNet - Oceanic Equipment/Routing Details

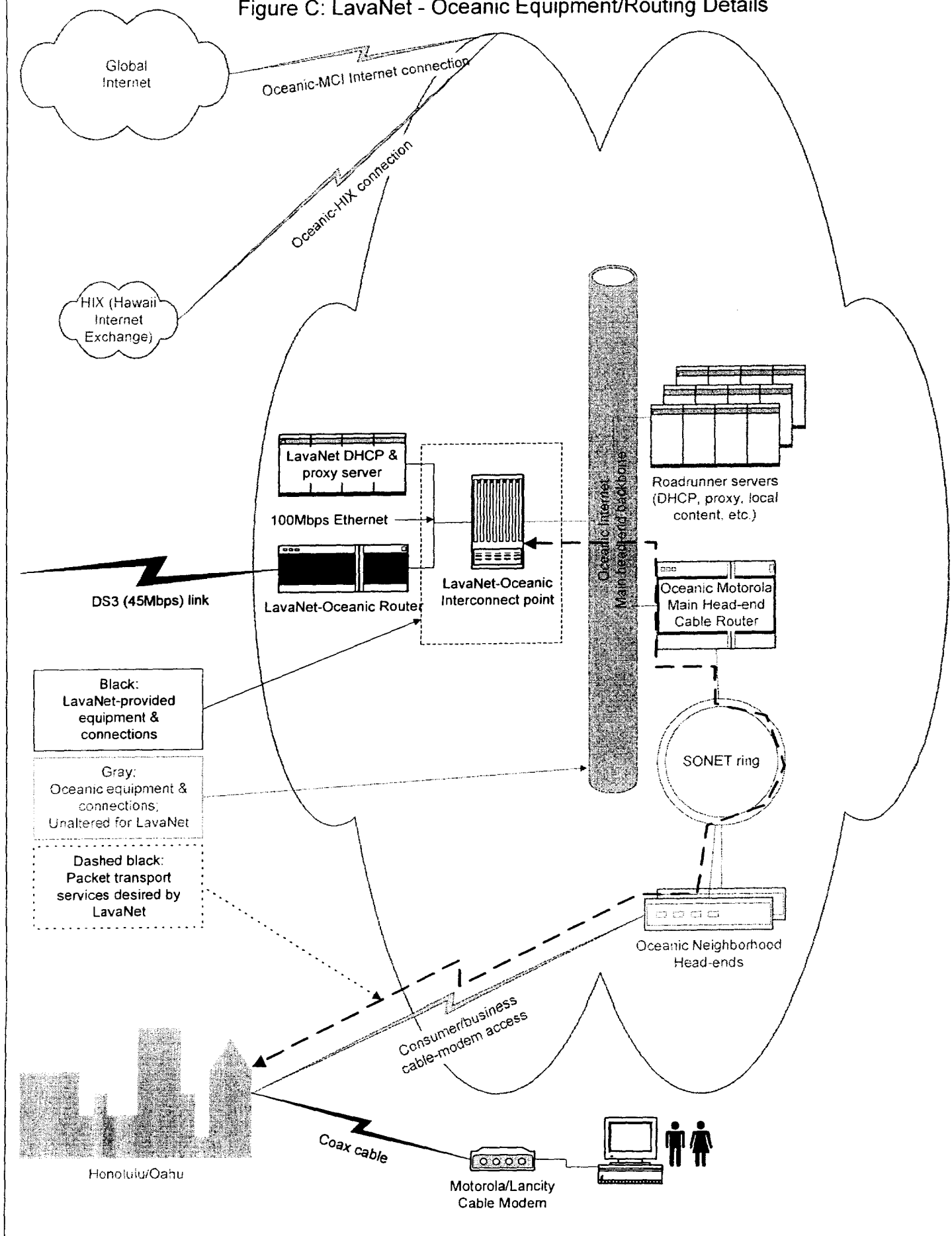
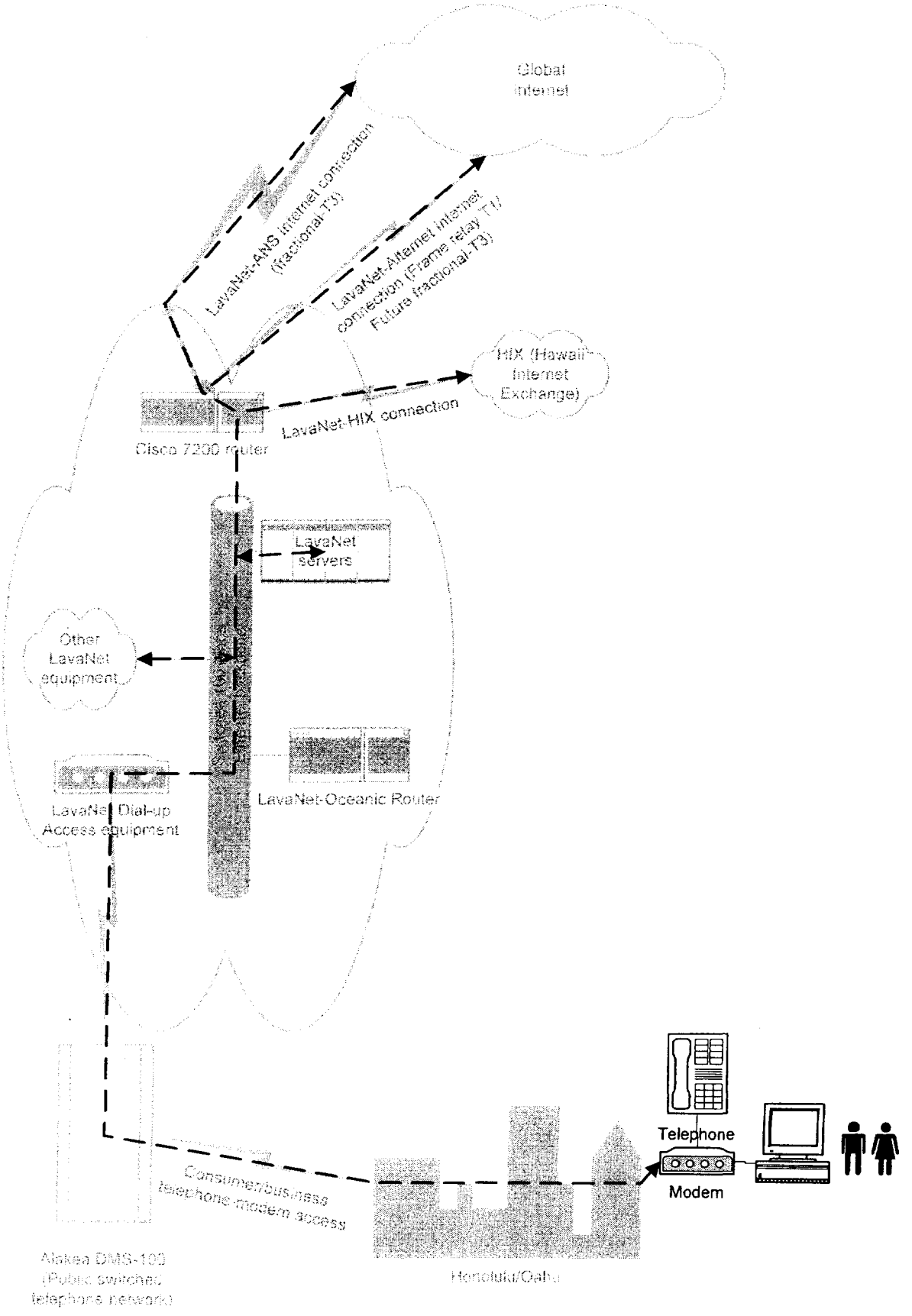


Figure D: LavaNet - Normal Dial-up Internet Access Handling (for comparison)



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OF COUNSEL:
BIRNEY B. BERVAR

December 9, 1997

Mr. Clifton Royston
President
Lavanet, Inc.
733 Bishop Street, Suite 2000
Honolulu, Hawaii 96813

Re: Internet Cable Service

Dear Mr. Royston:

You have asked us to review the laws which apply to the "Roadrunner" Internet service being offered by Oceanic Cablevision, Inc. ("Oceanic")[1], which we understand owns and/or operates a cable television network throughout much of the State of Hawaii. We further understand that "Roadrunner" is owned and/or operated by another Time Warner entity ("TW") pursuant to a contractual arrangement and that "Roadrunner" is transmitted over Oceanic's cable television network. This letter reports on our preliminary findings.

Summary

While the regulatory scheme is somewhat unclear in its application to this relatively new technology, existing laws support the conclusion that Internet services over a cable television network would constitute telecommunications services subject to regulation by the Public Utilities Commission ("PUC") under Chapter 269 of the Hawaii Revised Statutes ("HRS"). Internet use involves far more than video transmission and requires two-way interaction. Thus, internet services are far broader than, and would not constitute, cable services within the

[1] We have not been able to confirm the precise names of the entities which own and/or operate the cable television system and the Roadrunner internet service.

meaning of Chapter 440G, HRS. The result is that the exemption for cable services under Chapter 269, HRS, would not apply under the circumstances. Regulation under Chapter 269, HRS, would entitle Lavanet, Inc. to access the cable system to provide internet services of its own.

Discussion

The major issue in this matter is whether the use of the cable television network to deliver internet services is subject to regulation by the PUC under Chapter 269, HRS, or by the Department of Commerce and Consumer Affairs under Chapter 440G, HRS. As discussed below, internet services extend far beyond the scope of the cable services envisioned under Chapter 440G, HRS, leaving them open to regulation by the PUC under Chapter 269, HRS.

Section 440G-3, HRS, limits the definition of cable service to the one-way transmission of video programming with limited user interaction:

> "Cable service" means (1) the one-way transmission to subscribers of video programming or other programming service and (2) subscriber interaction, if any, which is required for the selection of video programming or other programming service.

The definition of video programming under Section 440G-3, HRS, is limited to that normally provided by television stations:

> "Video programming" means programming provided by, or generally considered comparable to programming provided by, a television broadcast station.

The foregoing definitions demonstrate the intent to limit Chapter 440G, HRS, to traditional television-type programming with limited user interaction. Those definitions are by no means broad enough to include the majority of services and information available on the internet. As you know, the internet contains all kinds of content and requires two-way interaction where users can not only request information, but can also forward and create information for dissemination to others. While some uses of the internet may arguably fall within the narrow definition of video programming under Section 440G-3, HRS,

to maintain the position that the internet constitutes a cable service as narrowly defined under that section would be difficult, if not impossible.

The definition of cable system is significant because of its impact on the scope of Chapter 269, HRS. As defined in Section 269-1, HRS, public utilities subject to regulation include telecommunications carriers:

> "Public utility" includes every person who may own, control, operate, or manage as owner, lessee, trustee, receiver, or otherwise, whether under a franchise, charter, license, articles of association, or otherwise, any plant or equipment, or any part thereof, directly or indirectly for public use, for . . . the conveyance or transmission of telecommunications messages . . . provided that the term:
>
> . . .
>
> (2) Shall include telecommunications carrier or telecommunications common carrier; . . . .

Under the definitions of telecommunications carrier and telecommunications services in Section 269-1, HRS, only cable services as defined under Chapter 440G, HRS, would be excluded:

> "Telecommunications carrier" or "telecommunications common carrier" means any person that owns, operates, manages, or controls any facility used to furnish telecommunications services for profit to the public, or to classes of users as to be effectively available to the public, engaged in the provision of services, such as voice, data, image, graphics, and video services, that make use of all or part of their transmission facilities, switches, broadcast equipment, signalling, or control devices.
>
> "Telecommunications service" or "telecommunications" means the offering of transmission between or among points specified by a user, of information of the

> user's choosing, including voice, data, image, graphics, and video without change in the form or content of the information, as sent and received, by means of electromagnetic transmission, or other similarly capable means of transmission, with or without benefit of any closed transmission medium, and does not include cable service as defined in section 440G-3.

Since internet services do not constitute cable services as defined under Section 440G-3, HRS, they would not be exempt from the definition of telecommunications service. Internet services clearly fall within that definition as they are transmissions of voice, data, image, graphics, and video which are specified by the user.

The result is that Oceanic would be a telecommunications carrier under Section 269-1, HRS, with respect to its providing internet services since it furnishes telecommunications services to the public for a profit. TW also would be a telecommunications carrier. As telecommunications carriers, Oceanic and TW would be regulated public utilities under Chapter 269, HRS. They would thus be subject to all of the requirements of Chapter 269, HRS, including ratemaking, financial reporting, cross-subsidies, and equal access.

Under Section 269-16.9, HRS, Oceanic and TW could seek an exemption from the requirements of Chapter 269, HRS. We do not know whether such an exemption has been requested and/or granted. However, in any event, the PUC is not authorized to issue any exemption from the provisions of Section 269-34, HRS, which is the section requiring equal access. Section 269-34, HRS, provides as follows:

> In accordance with conditions and guidelines established by the commission to facilitate the introduction of competition into the State's telecommunications marketplace, each telecommunications carrier, upon bona fide request, shall provide services or information services, on reasonable terms and conditions, to an entity seeking to provide intrastate telecommunications, including:

(1) Interconnection to the telecommunications carrier's telecommunications facilities at any technically feasible and economically reasonable point within the telecommunications carrier's network so that the networks are fully interoperable;

(2) The current interstate tariff used as the access rate until the commission can adopt a new intrastate local service interconnection tariff pursuant to section 269-37;

(3) Nondiscriminatory and equal access to any telecommunications carrier's telecommunications facilities, functions, and the information necessary to the transmission and routing of any telecommunications service and the interoperability of both carriers' networks;

(4) Nondiscriminatory access among all telecommunications carriers, where technically feasible and economically reasonable, and where safety or the provision of existing electrical service is not at risk, to the poles, ducts, conduits, and rights-of-way owned or controlled by the telecommunications carrier, or the commission shall authorize access to electric utilities' poles as provided by the joint pole agreement, commission tariffs, rules, orders, or Federal Communications Commission rules and regulations;

(5) Nondiscriminatory access to the network functions of the telecommunications carrier's telecommunications network, that shall be offered on an unbundled, competitively neutral, and cost-based basis;

(6) Telecommunications services and network functions without unreasonable restrictions on the resale or sharing of those services and functions; and

> (7) Nondiscriminatory access of customers to the telecommunications carrier of their choice without the need to dial additional digits or access codes, where technically feasible. The commission shall determine the equitable distribution of costs among the authorized telecommunications carriers that will use such access and shall establish rules to ensure such access.
>
> Where possible, telecommunications carriers shall enter into negotiations to agree on the provision of services or information services without requiring intervention by the commission; provided that any such agreement shall be subject to review by the commission to ensure compliance with the requirements of this section.

As provided under Section 269-34, HRS, Oceanic and/or TW would be obligated to provide Lavanet, Inc. with equal access to the cable television network upon reasonable terms and conditions in order to facilitate the introduction of competition in the telecommunications industry. The section envisions Lavanet, Inc. making a bona fide request for access to Oceanic and/or TW and negotiating the access terms with them. If Oceanic and/or TW refuse to negotiate, Lavanet, Inc. could ask the PUC to force compliance by Oceanic and/or TW.

Section 269-34, HRS, was part of the 1995 telecommunications act which was intended to facilitate competition in the telecommunications industry. See, 1995 House Journal, SCRep. 509, p. 1213. Oceanic and its telecommunications affiliate, Oceanic Communications, submitted testimony in support of the act. Id. at 1214. Internet access over a cable system was not specifically addressed in the 1995 act. However, the application of the act to this matter would be consistent with the stated purpose of promoting competition in telecommunications. We perceive many issues of concern if companies such as Lavanet, Inc. are not afforded an equal opportunity to participate in this new use of technology and compete with Oceanic and TW on an equal basis. Thus, in addition to relief from the PUC, Lavanet, Inc. could also seek to have the legislature address the issue.

Thank you for allowing us the opportunity to assist Lavanet, Inc. in this matter. As discussed above, the foregoing

are our preliminary findings. Please let us know if you require further assistance in this matter.

Very truly yours,

Steven Y. Otaguro

SYO:cef

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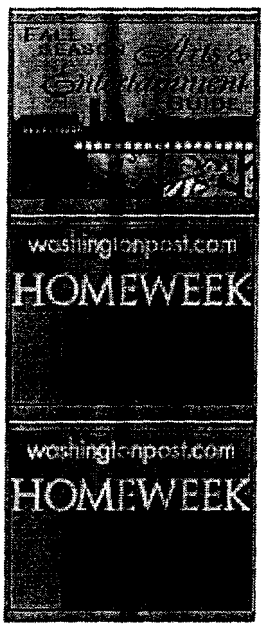


Fairfax City Opens Cable Lines

By Eric L. Wee and John Schwartz
Washington Post Staff Writers
Friday, October 1, 1999; Page B02

The City of Fairfax jumped into the growing national debate over the future of the Internet when its City Council voted this week to require its new cable television provider to open up its high-speed lines to other Internet service providers.

The council's 4 to 2 vote would require Atlanta-based Cox Communications Inc. to let competitors provide Internet service to Cox customers over the high-capacity cable wires that go into their homes. Starting today, Cox becomes the new cable operator for Fairfax County and the City of Fairfax, the result of its purchase of Media General Cable's Northern Virginia operation for $1.4 billion.

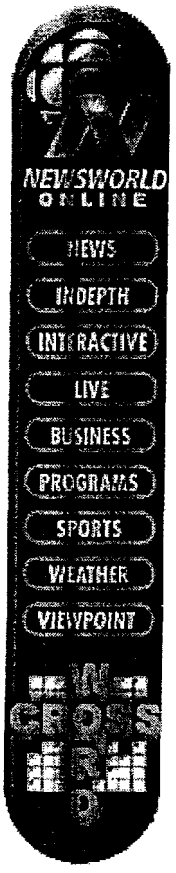
Officials in Portland, Ore., and Broward County, Fla., have taken similar actions with their cable provider, AT&T, and have been taken to court for it.

A coalition of Internet providers, led by industry behemoth America Online, argues that opening up the high-speed cable lines will make Internet service more competitive and less expensive for consumers. Indeed, AOL advised Fairfax city officials as they considered the measure.

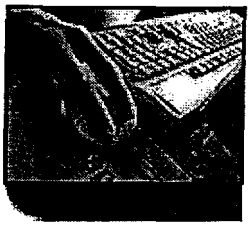
Cox and other cable operators argue that communities have no legal authority to impose such requirements. They say they've spent big money to wire homes to cable systems and shouldn't be forced to let competitors benefit from it. Instead, the cable television companies want to use those wires to provide Internet service in competition with companies such as AOL and Erols.

Cox representatives said yesterday that if negotiations fail, they may sue the City of Fairfax--a step city officials said they expect. The company also threatened to not provide high-speed data service to the company's 5,600 customers in the city. The council's action does not affect surrounding Fairfax County, which has nearly 250,000 cable subscribers and recently approved Media General's transfer to Cox with no such conditions.

Fairfax city officials who pushed for the open access said they did it



NEWSWORLD ONLINE



Canadian cable companies forced to share Internet access

WebPosted Tue Sep 14 17:12:16 1999

OTTAWA - Federal regulators have given cable companies a deadline of 90 days to allow rival Internet Service Providers onto their turf.

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The Canadian Radio-television and Telecommunications Commission told the cable companies Tuesday to provide the high speed cable service-- which is twenty times faster than a conventional modem-- to ISP's at a discounted price.

The cable companies had been protecting their ability to provide high speed access to the Internet.

But a year ago, the CRTC ordered them to give access to third-party Internet service providers.

Cable companies must sell their high speed services to their rivals at a 25 per cent discount

Those businesses complained that the cable firms, including Rogers, Shaw and Videotron have been stalling so they can build up their own hold on the high speed market before letting others in on the action.

So now, the CRTC has ordered the cable companies to sell their high speed services to their rivals at a rate 25 per cent cheaper than their lowest retail price, and to do so within 90 days.

The regulators said that until the technology exists that would let ISPs tap directly into the lines, the cable industry will have to make access more affordable lest it stifle competition.

The idea is to open up competition in the high speed

market and offer more choice to customers.

High-speed Internet services controlled by telephone companies were not included in this ruling.

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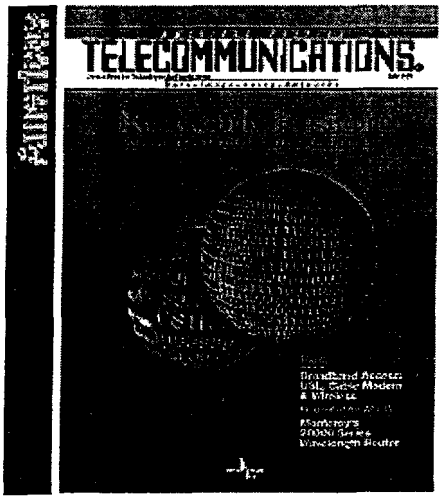

Open Cable--Timmins Did It

Commentary

Sam Masud, senior editor

Write it in smaller print if you wish, but put Judge Owen Panner's name alc of Harold Greene, the federal judge who presided over the breakup of the E TCI's cable network should be open to all Internet service providers and no @Home, AT&T's proprietary cable ISP, the U.S. District Court judge for (in his June 4 decision that favored the city fathers of Portland. The issue ca Judge Panner when AT&T filed suit against Portland after the city refused t transfer of TCI cable franchises to AT&T unless AT&T agreed to provide u ISPs open access to the network.

AT&T is spending $100+ billion to buy cable giants TCI and MediaOne pre order to have its own wire to the customer. Immediately following the rulin attorney for AT&T said the decision might have the effect of delaying or re services for subscribers--in other words, cable companies may not want to networks to offer Internet access, telephone services and more TV channels argument didn't hold water with one Portland city councilman who told rep AT&T chose not to offer high-speed data service, then the city would find a that would.

Now other cities could follow Portland's lead and eventually the entire issu decided by the Supreme Court or Congress. Some may think that Portland precedent, but that's not so. Portland is way behind Timmins. Timmins? Y up in Ontario, Canada. Regional Cablesystems Inc., the local cable compar the residents of Timmins the honor of becoming the first community in Nor be able to choose its cable ISP. Explaining the action, a representative of Re Cablesystems said the company decided to become a wholesaler of cable m rather than a retailer. Others will say that Regional Cablesystems saw the w wall, since the Canadian Radio-television and Telecommunications Commi concluded that cable companies should open up their networks, although it deadline for them to do so.

Judge Panner's ruling runs about a dozen pages, but the crux of the legal re contained in a few sentences: "The issue is whether the city and county hav to require access to the cable modem platform as a condition of approving A takeover of the cable franchises. To resolve the legal issue, I don't need to whether the open access requirement is good policy. [AT&T, TCI et al] con

open access requirement is preempted by federal statutes regulating cable te
conclude that the open access requirement is within the authority of the city
protect competition," Judge Panner wrote.

Protect competition--those are powerful words. For AT&T, they're going t
ones to overcome, even if the coax cable going into subscribers' homes wa
put in with AT&T's money (or, more correctly, by TCI or any other cable
There are legal issues involved in this dispute, but also something else that
lawyerly wrangling. Seemingly overnight, the Internet has emerged as a po
medium, unparalled by any other form for disseminating information or cor
business.

Before the age of telecom deregulation, the governments of the world and t
thought they'd come up with a nonproprietary data communications model
Systems Interconnection standard. Buyers voted with their checkbooks and
products because they were cheaper and because they saw how quickly nev
technologies developed in the Internet world. My point is that the internet is
different--the old rules don't apply to it. If I can get Internet access from m
choice via my phone line, why shouldn't I have that same freedom if I use
modem to access the Internet? Sure you could come up with all kinds of ar
franchises, contracts and ownership. But you'd really be arguing about givi
choice vs. not giving them a choice, competition vs. monopoly, freedom
you get the point.

to better serve their residents.

"This is the story of a little city taking the initiative and taking leadership in an issue that's fast becoming a dominant issue across the nation," said Scott Silverthorne, the Fairfax council member who sponsored the measure. "What I'm trying to do is . . . give our constituents as many choices as possible for their Internet services."

Many people see the debate over high-speed data lines as crucial to the future of the Internet. The cable lines that already reach into many homes can provide so-called "broad band" Internet service, allowing users to flip through graphics-laden pages on the World Wide Web far more quickly than by connecting to the Internet over traditional telephone lines.

Internet providers such as AOL say that cable companies should be forced to lease those lines to them to spur competition.

Rich Bond, co-director of a group called the openNet Coalition, which represents more than 800 technology companies, said legislators across the country are mulling the same issues.

"It's a courageous [move] by the folks in Fairfax City," said Bond. He accused Cox of "bullying" in its threat to not implement high-speed Internet service for Fairfax City customers.

Cox and cable company organizations say it simply isn't fair to force cable operators to accommodate competitors.

"I don't think we're trying to use bully techniques," said Amy Cohn, Cox's spokeswoman. "We spent a lot of money and capital to upgrade the networks for broadband service. . . . We have a real financial interest to protect."

Josie Martin, vice president of public affairs at the National Cable Television Association, called Fairfax's move disappointing. "There's no reason for the government--any government, not Fairfax City, not the United States Congress--to insert themselves into this issue at this time. The marketplace can and will decide this, and the consumers will be the beneficiaries."

Under federal communication regulations, companies must get approval from local jurisdictions before taking over a local cable operation, the way Cox is taking over Media General's Northern Virginia markets.

Fairfax County and five smaller jurisdictions in Northern Virginia that have been served by Media General Cable of Fairfax have signed off on the Cox takeover. And even the Fairfax City Council said that if Cox sues and wins, it would allow the transfer to proceed.

The Vienna Town Council is scheduled to decide next week whether to approve the Cox takeover in that community.

City confronts Cox on Internet access

Council demands cable company allow ISPs use of network

By ROBERT WHITE
Journal staff writer

Joining the national battle over high-speed Internet access, Fairfax City has become the third jurisdiction in the nation to demand its cable company allow Internet service providers to use its cables for broadband modem service.

Officials of Cox Communications, the city's cable company, immediately said they will fight the order, as was the case earlier this year when Portland, Ore., and Broward County, Fla., made similar demands on their cable provider, AT&T.

Cox also threatened to not bring high-speed service to Fairfax City at all.

"We will carefully look at what our legal options are, then proceed accordingly," said Thomas E. Waldrop, chairman of Media General Cable of Fairfax, which has been bought by Cox. Waldrop will continue in that role when the Atlanta-based cable giant's $1.4 billion purchase of Media General's cable operations goes into effect tomorrow.

"We have spent millions of dollars in investment to put the infrastructure in place," Waldrop said, asserting Cox is adamantly opposed to giving Internet providers, such as America Online, free use of those cables.

Amy Cohn, a company spokeswoman, said Cox would try to resolve the dispute amicably. But if Fairfax City does not reverse its position, she said, "we will pull back our deployment of high-speed Internet service for the residents of the City of Fairfax."

Broadband cable pipelines offer Internet connections at speeds dozens of times faster than traditional telephone modems, making possible new computer applications including TV-quality video and improved audio over the Web.

In approving the transfer of its cable franchise Tuesday night, the Fairfax City Council jumped into uncertain legal territory by requiring "open access" to the miles of cables that run into homes, businesses and apartments within the six-square-mile city with a population 20,500. The council vote was 4-2.

The Federal Communications Commission has taken a hands-off position toward the debate over open access, and the matter is not covered in federal telecommunications legislation. Cities and counties have started to press the issue in the wake of cable mergers that have seen corporations like AT&T, Cox Communications and Time-Warner reshape the industry by gobbling up smaller competitors. Each purchase requires approval of the local governing body.

"I think this puts us in a leadership position," said Fairfax City Councilman Scott Silverthorne, who pushed for the open-access requirement. "We did what we felt was necessary to provide the kind of services we feel are appropriate."

The OpenNet coalition, representing 800 technology companies and Internet providers who favor open access, expressed support for Fairfax City's vote, saying cable companies threaten to stifle competition by denying other companies access to their Internet pipelines.

"Consumers should have the right to choose whatever Internet service provider they want, and cable companies should not be allowed to eliminate that choice by closing their networks to competition," coalition director Rich Bond said in a statement.

Fairfax County and Falls Church, also served by Media General Cable, declined to press the issue when they approved the franchise transfer to Cox. Because cities and counties are separate entities in Virginia, Fairfax City's vote only applies to the piece of the cable system within the city.

Under the measure approved by the council, Cox must provide any Internet service provider access to its broadband cables "on rates, terms and conditions that are at least as favorable as those on which it provides such access to itself [or] to its affiliates."

The two Fairfax City councilmen who voted against demanding open access said they wanted more time to study the issue but were not necessarily opposed to the requirement.

One of them, Chap Petersen, said the city is well aware that Tuesday's vote is all but certain to launch a lawsuit.

"I think we're going to get sued by them anyway," he said, because the city is trying to lure another cable company to compete with Cox. "If [a lawsuit] happens, it happens."

A federal court has upheld Portland's open-access provision, although AT&T is appealing.

Cable companies fight open access on the grounds they need the money generated from Internet services to defray the costs of building new, fiber-optic, digital infrastructures.

"The mere suggestion from government that such risky investments could be subjected to old-fashioned cost-of-service regulation would have a chilling effect on going-forward investments and would slow down the rollout of these new advanced Internet services," Cox Communications president James Robbins told the U.S. Senate Commerce Committee in April.

The industry also contends Internet providers can use telephone-based Digital Subscriber Lines rather than high-speed cable access, although some experts say DSL has too many limitations to compete effectively with cable.

In Northern Virginia, phone companies Bell Atlantic and GTE, which double as Internet providers, have been most vocal in pushing for open access. Silverthorne said he talked with representatives of those firms before Tuesday's meeting.

Jimmy Hazel, a lobbyist for Dulles-based America Online, the world's largest Internet provider, was present at the Fairfax City meeting and helped Silverthorne draft the language adopted by the council - although Hazel said he was there at Silverthorne's request, not in an official AOL capacity.

A company spokeswoman nonetheless applauded Fairfax City's decision.

"Open access is the right policy for the consumer and for the growth of the Internet," spokeswoman

Kathy McKiernan said.
